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No. 88-53

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

BOEING COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether there are material issues of fact precluding summary judgment for petitioner in this case challenging petitioner's employment policy of forcing its pilots to retire from flight status at age sixty.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 843 F.2d 1213. The opinion of the district court (Pet. App. 47a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1988. The petition for a writ of certiorari was filed on July 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a manufacturer of aircraft. Petitioner employs more than 60 pilots to test its aircraft, to instruct commercial airline pilots, and to deliver the aircraft to petitioner's customers (Pet. App. 69a-73a). Since 1980,

petitioner has required all of its pilots to retire from flight status at the age of sixty (*id.* at 48a).

2. In 1984, the Equal Employment Opportunity Commission (EEOC) filed this suit alleging that petitioner's retirement policy violates the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.* (ADEA). Section 4(a)(1) of the ADEA makes it unlawful for an employer to discriminate against "any individual * * * because of such individual's age" (29 U.S.C. 623(a)(1)).

Petitioner moved for summary judgment. In its motion, petitioner relied solely on a regulation of the Federal Aviation Administration (FAA) that bars commercial air carriers from employing pilots over the age of sixty to operate large passenger airplanes (14 C.F.R. 121.383(c)). The FAA regulation does not cover petitioner, which is not a commercial carrier. Nevertheless, petitioner argued that the FAA rule establishes, as a matter of law, that being younger than age 60 is a bona fide occupational qualification (BFOQ) for petitioner's pilots (Pet. App. 7a).[1]

The district court granted summary judgment in favor of petitioner. The court stated "that for purposes of establishing a BFOQ the job performed by [petitioner's] pilots is almost perfectly congruent with that performed by airline pilots" (Pet. App. 73a). The court then concluded that the FAA rule "is essentially conclusive evidence" that being less than age 60 is a BFOQ for petitioner's pilots (*id.* at 52a). The district court explained that the FAA regulation, "coupled with the background of the regulation and the congruity of the relevant pilot positions, establishes a

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[1] The ADEA provides a narrow exception to its prohibition on age discrimination where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * * " (29 U.S.C. (& Supp. III) 623(f)(1)).

BFOQ defense for [petitioner] as a matter of law" (*id.* at 77a).

3. The court of appeals reversed and remanded the case for a trial. The court of appeals concluded that "the evidence offered by EEOC raised genuine issues of fact that required trial" (Pet. App. 8a). In particular, the court cited conflicting evidence on whether petitioner could test its pilots on an "individual basis" to determine whether a pilot can "discharge safely his or her duties" (*id.* at 16a). And the court of appeals cited other evidence casting doubt on petitioner's BFOQ defense—*e.g.*, petitioner did not adopt its policy until 1980 (*id.* at 18a-19a). Thus, the court of appeals held that the trier of fact must judge the merits of petitioner's BFOQ defense (*id.* at 21a-22a).[2]

ARGUMENT

The judgment of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Moreover, the court of appeals' judgment is correct. Thus, no further review is warranted.[3]

1. In *Western Air Lines, Inc.* v. *Criswell,* 472 U.S. 400 (1985), this Court set forth the legal rules that govern this case. In *Criswell,* the Court considered the relevance of the FAA's age-60 rule to a particular airline's policy requiring its flight engineers to retire at age 60. The Court held:

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[2] In so holding, the court of appeals rejected petitioner's claim that the FAA rule establishes petitioner's BFOQ defense as a matter of law. The court observed: "There is serious doubt that the FAA Rule reflects a determination by FAA that age 60 is a BFOQ as defined by ADEA for the commercial pilots to whom it applies, much less a BFOQ for [petitioner's] pilots" (Pet. App. 34a).

[3] The petition should also be denied because the court of appeals' decision is interlocutory. If petitioner prevails at trial, its argument will become moot. And if petitioner loses at trial and a final judgment is affirmed, petitioner may renew its argument in this Court.

"Although the FAA's rule for pilots, adopted for safety reasons, is relevant evidence in the airline's BFOQ defense, it is *not to be accorded conclusive weight*" (*id.* at 418) (emphasis added). The Court concluded that the "extent to which the rule is probative varies with the weight of the evidence supporting its safety rationale and 'the congruity between the * * * occupations at issue' " (*ibid.* (citation omitted)). See *Johnson* v. *Mayor & City Council of Baltimore,* 472 U.S. 353, 371 (1985) (Federal law providing for retirement of federal firefighters at age 55, if it were based on occupational qualifications, "might be relevant * * * to a district court engaged in reviewing [a private] employer's BFOQ defense.").

The point of *Criswell* is that the FAA's age-60 rule is simply evidence on the BFOQ issue. That rule is not, by itself, a complete defense in cases where the rule does not apply. In such cases, as here, the standard for summary judgment is whether there is conflicting evidence so that a reasonable juror could return a verdict in favor of the nonmoving party. See *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242 (1986). There is no rule of law, and nothing in *Criswell* suggests, that a juror must defer to the FAA's view of facts in situations where the FAA rule does not apply. Thus, petitioner is plainly wrong in contending (Pet. 15-17) that the only relevant factual question in this case is the similarity between flying a commercial airliner with a large number of passengers (where the FAA rule applies) and flying petitioner's aircraft.

At bottom, petitioner's contention is that the FAA's rule is such overwhelming evidence that any reasonable juror must find that petitioner has proved its BFOQ defense. That contention is belied by the record and is inconsistent with the role of a jury under the ADEA. In adopting the ADEA, "Congress expressly decided that problems involving age discrimination in employment should be resolved

on a 'case-by-case basis' by proof to a jury" (*Criswell*, 472 U.S. at 422). The evidence in this case is sharply divided on the BFOQ issue and must be resolved by a properly instructed jury.

2. In the first place, the evidence before the FAA when it adopted and retained its rule shows that experts disagree over whether individual testing can identify those pilots who are unsafe to fly after age 60. See Pet. App. 18a.[4] The *Criswell* opinion makes it clear (472 U.S. at 422) that such conflicting expert evidence is sufficient, by itself, to raise a question for the jury. Moreover, the EEOC submitted recent expert opinion indicating that "newly developed scientific techniques permit[ ] accurate prognosis on an individual basis of actual or potential loss of function" (Pet. App. 18a). Thus, the court of appeals was plainly correct in not resolving this conflicting evidence without a trial. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 248 ("the weighing of evidence, and the drawing of inferences from the facts are jury functions, not those of a judge").

The EEOC submitted other probative evidence casting doubt on petitioner's BFOQ defense. For example, before 1980, petitioner employed pilots beyond age 60 without any incident. See Pet. App. 18a. The FAA itself and the Navy do not force their own pilots to stop flying at age 60

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[4] The FAA has the authority to impose its age-60 rule on petitioner but it has never done so. Thus, petitioner is plainly wrong in arguing (Pet. 9) that this case "creates a direct conflict between" the FAA and the EEOC.

(*id.* at 19a). And one of petitioner's retired pilots stated in his affidavit that "[e]xperience, training, and pilot technique, rather than age, are the primary factors in conducting experimental, engineering, production, and training flights" (Pet. App. 111a). He stated that "pilots removed from flight status at age 60 and then forced to retire represent the safest group of pilots Boeing has ever employed" (*ibid.*).

To be sure, the existence of the FAA rule is "relevant evidence" (*Criswell,* 472 U.S. at 418). But the weight of that evidence in this case is fairly subject to dispute. When all the evidence is considered, therefore, it is clear that a "reasonable jury could return a verdict for" the EEOC (*Anderson,* 477 U.S. at 248).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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